BEREC Submission

Stakeholder Meeting for the Reform of BEREC Guidelines on the Implementation of European Net Neutrality Rules

17 June 2019

Introduction

This submission is supported by seven digital rights NGOs and contains argumentation and suggestions for the ongoing reform of the BEREC Guidelines (Guidelines) on the Implementation by National Regulatory Authorities (NRAs)of Regulation (EU) 2015/2120 ("the Regulation"). We want to thank BEREC for the invitation to the Stakeholder Workshop on 29 May 2019 in Brussels. This submission is detailing certain points of our oral testimony and aims at informing the reform debate among NRAs and interested parties[1].

End-user rights and Commercial practices

A central question for the ongoing reform is the discussion about commercial practices and agreements and their infringement of end-user rights according to paragraphs 1 and 2 of Article 3 of the Regulation. The most common practices in this field are zero-rating and application-specific data volume, which can both be summarised as Differential Pricing Practices (DPP). These practices also fall under the general non-discrimination rules of Article 3 (3) subpara 1, referring to equal treatment of traffic.

In the past 2.5 years of net neutrality enforcement in the European Union the practice of DPP has spread to all but two countries in the EEA[2]. A complete survey conducted by epicenter.works identified 186 individual differential pricing offerings[3]. Although the Regulation places restrictions on these types of commercial offerings and even obliges regulators to intervene in certain cases, not a single NRA has intervened against DPP based on their infringement of end-user rights. The BEREC Guidelines have interpreted the Regulation as requiring a case-by-case assessment of these practices and outlined a set of criteria for their evaluation. Most of the regulatory decisions on these offerings have not followed the criteria set by the Guidelines or been very inconsistent and creative in their application[4].

The current Guidelines have not fulfilled their purpose of creating clarity which practices are allowed and which should be prohibited, neither do they establish a comprehensive and balanced assessment framework that gets applied by NRAs in the exercise of their enforcement and supervision duties. The current interpretation of the Regulation in the Guidelines already favours interests of telecom operators and is to the detriment of the rights of consumers and Content and Application Providers (CAPs). The undersigned organisations believe that a bright-line rule banning DPP would be the best interpretation of the Regulation by BEREC to ensure the key objectives of the Regulation: safeguarding end-user rights and the innovative nature of the internet ecosystem.I Aside from this position, we have four suggestions for improvements of the existing framework of the Guidelines.

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1 You can find previous submissions to this work stream: https://en.epicenter.works/document/1136

2 Report on the Net Neutrality Situation in the EU: https://epicenter.works/document/1522

3 Data set of all DPP can be downloaded here: https://epicenter.works/document/1521

4 See the decision of ANACOM against sub-internet offers and DPP in Portugal https://www.anacom.pt/render.jsp?contentId=1456674 and our consultation response: https://en.epicenter.works/document/1111

1. Sign-on procedures for interested CAPs to DPP have to be fully transparent, not pose any barriers and be non-discriminatory in practice

One of the key factors behind the success story of the internet ecosystem as an engine of innovation, has been its multi-layer structure: the networks are divided into layers that each deal with their own innovation, security and privacy features, while allowing for interoperability in the network. This has made it possible for a large range of commercial, academic och individual agents to contribute to service and product innovation, ultimately bringing economic and social benefits to all end-users of the networks. i. The sign-on procedures of many DPPs are antithetical to this key element and create new administrative, legal and technical barriers for CAPs to compete and are also discriminatory in practice. Currently many DPPs are classified by NRAs as non-discriminatory vis-à-vis CAPs if they offer some form of contact point for CAPs that are interested in joining the programme and the conditions they impose are the same for all CAPs. However, these requirements are insufficient.

First of all, as epicenter.works has shown in its report on the Net Neutrality Situation in the EU, half of the contacted operators did not respond to the inquiry of a small CAP within the period of investigation, raising questions of whether the sign-up offer is even genuine. Some contact points require a phone number of the country where the telecom operator offers its service, restricting the free movement of online services across Member States, thus undermining the digital single market.

Second, providers offering DPP use their own definitions and criteria for determining the classes of CAPs that are eligible for sign-on to their DPP. The Guidelines are lacking any clear criteria as to how such classes of eligible CAPs should be defined. This leaves room for arbitrary distinctions between eligible and non-eligible CAPs operating within the same market, and thus having a clear discriminatory effect in practice. It also confuses consumers when functionalities like voice messages or video calls of zero-rated apps are not included or integrated apps of the same CAP are split between different DPP offerings[5].

Third, the overwhelming majority of CAPs that enter into DPP programs only enter into between one and three partnerships, which is likely caused by the administrative and technical burden of the ongoing cooperation to keep the service or application identifiable in the network of each operator and the potential liabilities that are incurred should traffic identification not succeed at any point in time.[6] This problem was confirmed by the oral testimony of the Selfie Network at the aforementioned BEREC Stakeholder meeting. This company offers consulting services to CAPs regarding the participation in DPPs and could hint that the sign-on procedure poses a substantial burden for CAPs.

Solutions:

- As the evaluation of DPPs is mainly done ex-post by NRAs, the assessment of a DPP offer should take the practical implementation into account and not be based on an analysis of the underlying documentation of the offer only. This includes all relevant processes, technical implementation, market impact from the CAP perspective and effects on end-user rights. In particular, NRAs could look at vertical integration and how it may influence the competitive landscape among CAPs, in particular the impact on the "continued functioning of the internet ecosystem as an engine of innovation".

5 Examples include Telegram or WhatsApp voice messages or audio/video calls which are often not included in DPP offerings for "chat" or "social media". Facebook Messenger and Facebook itself sometimes are split between packages. See https://en.epicenter.works/document/1521

6 See page 21-31: https://en.epicenter.works/document/1522

- NRAs should gather evidence in the form of mystery shopping as interested CAPs that try to join DPPs. Negative results should prompt regulatory intervention and need to be made public.
- In order to fulfill the obligations of the Regulation, NRAs should aim for cross-border cooperation to establish the cross-border implications ofDDP offers in the EEA, by focussing on CAPs which are not from the country where the Internet Access Service Providers (IASP) offers the DPP. This approach is essential given the language of Article 3(1) "*irrespective of the location*", which given the nature of the underlying single market principles can't be understood as limited to services which would already be accessible by traditional transmission methods on each national market, but as encompassing services that, due to new technical opportunities, could now be easily accessible in the entire EEA.
- IASPs should be obliged to provide end-users and CAPs with clear and accessible contact information for questions about the DPP offer and how and where they can submit any complaints to the relevant NRA.
- The Guidelines should provide clear criteria for assessing the definitions for classes of applications used for DPP (like Music, Maps Chat or Social) and its effects on end-user rights, including the vertical integration effects on the competitive situation for CAPs. If necessary, NRAs should attempt to coordinate with competition authorities, while BEREC can coordinate with the European Competition Network.
- The Guidelines should take into account the cumulative effect of different DPP offers with different conditions and procedures on end-user rights, and smaller or new CAPs in particular. Market entry barriers that are raised by DPPs should be given particular attention.
- IASPs should not be allowed to oblige CAPs to sign NDAs as part of the sign-on procedure.[7]
- IASPs should be obliged to make the full contractual and technical conditions of the DPP directly available on their websites in all official EU languages before sign-on.
- Communication about setup or changes in the identification criteria via which the CAP can make its service identifiable in the network of the IASP need to follow a standardised format so that CAPs can scale their participation in DPPs, without restricting the development of their service.
- Access to beta versions and unreleased features of the application or service cannot be conditions for the participation in the DPP.[8]
- IASPs with subsidiaries in several countries that also offer similar DPP should be required, as part of the sign-on procedure in one country, to offer CAPs the possibility to also obtain DPP membership in the DPP in all other countries.

2. Prohibiting DPPs that undermine the essence of end-user rights

Article 3(2) places restrictions on agreements to not limit the rights of Article 3(1) to use and offer services irrespective of the location. Closed DPP which do not offer competing CAPs the option to also

7 This is currently the case in several countries with the Vodafone Gigapass offer.
8 Such conditions have been found in the TOS of StreamOn by Deutsche Telekom.

be available with the same commercial conditions as partnering CAPs undermine the rights of these CAPs and the rights of the customers of the IASP.

The Guidelines currently offer no clear metric by which to determine the extent to which the rights of CAPs who do not wish to or cannot become part of a DPP offer are infringed. This impedes a consistent determination of which limitations of end-user rights presented by DPP offers in effect undermine the essence of these rights.

Solutions:

- Closed DPPs should be prohibited. Without a sign-up procedure in place, such offerings limit end-user rights so as to infringe on their essence and NRAs should be required to intervene.
- The essential metric to evaluate the level of infringement of a DPP on end-user rights is the **price per usage duration of a service**. As Article 3(1) is a right to offer and use a service, the unit of such usage has to be the criterion to assess the limits placed on this right by commercial practices and agreements. Previously NRAs have utilised metrics such as the amount or price of general or application-specific data volume, which fail to capture limitations on the freedom to use and offer services.

3. Privacy aspects of DPP offers

As described in the recent open letter on the practice of Deep Packet Inspection (DPI) that was co-signed by 45 academics, NGOs and companies[9] and in the chapter about privacy implications of DPP in epicenter.works's report[10], the privacy impact of DPPs has to play a crucial role in the assessment of their legality. Currently most NRAs have not put an emphasis on the privacy dimension of these services. Notwithstanding a shared competency with Data Protection Authorities (DPAs) the overall assessment of the DPP in question needs to take privacy considerations into account.

As not all DPAs may be familiar with the details of the privacy impacts of DPI and may not be able to compare them to established practices, both regulators would benefit from guidance of BEREC in the ongoing reform on this matter.

Solutions:

- Privacy impact assessment on the concrete technical implementation of DPPs and the legal basis for the processing of any personal data, including communications data.
- Clear prohibition of DPI for the treatment of traffic. Explanation of DPI in terms of concrete scenarios (SNI, domain names, URLs)
- Clarification on the legality of business models based on the monetisation of user traffic in light of the GDPR, ePrivacy Directive and the Regulation.
- Guidance on the legality of "DNS Snooping"[11]

9 See: https://en.epicenter.works/document/1954
10 See page 34-35: https://en.epicenter.works/document/1522
11 See page 34 the example from internal Vodafone Pass documents which offer "DNS Snooping" as a means of identifying participating CAPs: https://en.epicenter.works/document/1522

4. Rights based arguments & cooperation with other competent authorities

BEREC acknowledged in the current Guidelines that rights-based approaches like freedom of expression, media diversity, privacy, data protection and competition rules should play a role in the assessment of commercial practices and agreements. Similarly important are the freedom to conduct business and of economic activity. In most Member States the regulatory competence on these issues does not reside with the same regulatory authority that is assigned to supervise and enforce the Regulation.. Therefore, we think it is vital that NRAs and other competent authorities cooperate in cases where these factors come into play, and there should be similar cooperation between BEREC, the European Data Protection Supervisor, the European Data Protection Board, the European Competition Network and other competent bodies (e.g. in consumer protection spaces).

Solutions:

- Assessment on the impact of DPP on media diversity and freedom of expression;
- Assessment on the impact of DPP on the freedom to conduct business (across Member States);
- Assessment on the impact of DPP on market entry barriers, including on layers of the value chain that are not directly impacted by the DPP but that rely on the services provided by either of the DPP partners;

Sincerely,

epicenter.works – for digital rights (Austria)
Bits of Freedom (Netherlands)
IT-Political Association of Denmark
European Digital Rights (Europe)
Article 19 (international)
Homo Digitalis (Greece)
Hermes Center (Italy)